Supreme Court, U.S.
FILED
JUL 16 1997
CLERK

No. 96-1788

In the Supreme Court of the United States

OCTOBER TERM, 1996

CITIZENS UNITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR THE PRESIDENT OF THE UNITED STATES IN HIS OFFICIAL CAPACITY

WALTER DELLINGER
Acting Solicitor General

FRANK W. HUNGER
Assistant Attorney General

STEPHEN W. PRESTON
Deputy Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
MICHAEL S. RAAB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner has a First Amendment or common law right to obtain a copy of a videotape of testimony given by the President of the United States in a criminal trial where the media and the public were permitted to view the testimony at the trial and have been provided a transcript of the testimony.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Application of CBS, Inc., In re, 828 F.2d 958 (2d Cir. 1987)	12
Application of National Broadcasting Co., In re, 635 F.2d 945 (2d Cir. 1980)	15
Application of National Broadcasting Co., In re, 653 F.2d 609 (D.C. Cir. 1981)	13, 15
Clinton v. *Jones*, No. 95-1853 (May 27, 1997)	2
Globe Newspaper Co. v. *Superior Court*, 457 U.S. 596 (1982)	16
Nixon v. *Warner Communications, Inc.*, 435 U.S. 589 (1978)	6, 7, 9, 10, 11, 13, 14
Press-Enterprise Co. v. *Superior Court*, 464 U.S. 501 (1984)	16
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980)	16
Seattle Times Co. v. *Rhinehart*, 467 U.S. 20 (1984)	16
Smith v. *United States District Court*, 956 F.2d 647 (7th Cir. 1992)	13
United States v. *Criden*, 648 F.2d 814 (3d Cir. 1981)	15
United States v. *Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977)	2
United States v. *Fromme*, 405 F. Supp. 578 (E.D. Cal. 1975)	3
United States v. *Guzzino*, 766 F.2d 302 (7th Cir. 1985)	13, 15

Cases—Continued: Page

United States v. *Kidd*, Crim. No. 78-9-Mac. (M.D. Ga. Apr. 11, 1978) 2
United States v. *Martin*, 746 F.2d 964 (3d Cir. 1984) 13, 15
United States v. *Poindexter*, 732 F. Supp. 142 (D.D.C. 1990) 2
United States v. *Poindexter*, 732 F. Supp. 165 (D.D.C. 1990) 17
United States v. *Webbe*, 791 F.2d 103 (8th Cir. 1986) 6

Constitution and rules:

U.S. Const. Amend. I 4, 5, 9, 10, 16
Fed. R. Crim. P.:
Rule 15 12
Rule 15(a) 3
Rule 53 ..... 6, 11
E.D. & W.D. Ark. R. F-5 6

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1788

CITIZENS UNITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR THE PRESIDENT OF THE UNITED STATES IN HIS OFFICIAL CAPACITY

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-19a, 20a-23a) are reported at 103 F.3d 651 and 92 F.3d 701. The opinion of the district court (Pet. App. 24a-34a) is reported at 940 F. Supp. 224.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1996. A petition for rehearing was denied on February 10, 1997. Pet. App. 35a. The petition for a writ of certiorari was filed on May 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This matter arises out of a federal criminal prosecution brought by Independent Counsel Kenneth W. Starr against then-Governor of Arkansas Jim Guy Tucker and two other defendants, James McDougal and Susan McDougal. The defendants were charged with multiple counts of criminal conspiracy and fraud relating to real estate transactions in Arkansas during the mid-1980s. See C.A. App. 1-48 (indictment).

In February 1996, the McDougals moved to compel the personal attendance of the President of the United States to give testimony in the defense case at trial. The Department of Justice, representing the President in his official capacity, filed an opposition to that motion. C.A. App. 49-63. The Department noted that Presidents have traditionally been permitted to provide testimony by answering interrogatories or submitting to a deposition instead of appearing at trial. *Id.* at 53-57.[1] Accordingly, the

---

[1] See *Clinton* v. *Jones*, No. 95-1853 (May 27, 1997), slip op. 9 n.14 ("Although Presidents have responded to written interrogatories, given depositions, and provided videotaped trial testimony, * * * no sitting President has ever testified, or been ordered to testify, in open court"); *id.* at 23 (reviewing history of presidential testimony); *United States* v. *Ehrlichman*, 546 F.2d 910, 932-933 (D.C. Cir. 1976) (affirming decision to permit then-President Nixon to answer interrogatories drafted by district court rather than present live testimony at criminal trial), cert. denied, 429 U.S. 1120 (1977); *United States* v. *Poindexter*, 732 F. Supp. 142, 144-146, 157-159 (D.D.C. 1990) (reviewing history of presidential testimony and authorizing videotaped deposition of former President Reagan); *United States* v. *Kidd*, Crim. No. 78-9-Mac. (M.D. Ga.) (order of April 11, 1978) (authorizing videotaped deposition of then-President Carter and further providing that copies of the videotape "shall not be furnished to anyone other than

Department proposed that the President provide testimony through a videotaped deposition, consistent with Rule 15(a) of the Federal Rules of Criminal Procedure, which would then be played in open court. C.A. App. 57.

In light of the unique concerns presented when a sitting President is requested to provide testimony, the district court approved the use of a videotaped deposition. Pet. App. 38a-42a. The court explained that requiring the President to travel to Arkansas to testify in person "would be unduly burdensome to the President in the performance of his official duties." *Id.* at 40a. The court directed the parties "to consult on any necessary editing of the videotape prior to its presentation at the trial." *Id.* at 41a. In response to inquiries from the parties and others, the district court subsequently issued an order directing the government, the defendants, and the President to file briefs regarding "the handling and release of the videotape." *Id.* at 44a. Shortly thereafter, the court issued a supplemental order inviting representatives of the news media to file briefs as well. C.A. App. 87.

On April 28, 1996, the President's deposition was conducted at the White House. Pet. App. 4a, 26a. The district court supervised the deposition through a two-way satellite television connection. *Id.* at 26a. By order of the district court, the proceeding was not open to the press or the public. *Id.* at 43a.

---

the court"); *United States* v. *Fromme*, 405 F. Supp. 578, 581-583 (E.D. Cal. 1975) (authorizing videotaped deposition of then-President Ford "[i]n recognition of the high office of the President and being mindful of the inconvenience and burden the subpoena will impose upon him").

Before the videotape had been shown to the jury, Reporters Committee for Freedom of the Press and a number of other news organizations (collectively Reporters Committee) filed an application for "immediate access to the videotape * * * so that it may be copied and disseminated through newscasts." C.A. App. 90. Alternatively, Reporters Committee asked to "view the videotape immediately and * * * copy the videotape at the time it is shown to the jury in open court." *Ibid.* Reporters Committee based its claim both on the First Amendment and on the common law right of access to judicial records. *Ibid.*

The district court directed the parties to respond to Reporters Committee's application in conjunction with their responses to the court's prior briefing order. C.A. App. 111. Reporters Committee sought reconsideration of that order and immediate access to the videotape. *Id.* at 112. The district court denied that request, noting that it had established a briefing schedule "to permit all interested parties a reasonable time to express their positions" regarding access to the videotape. *Id.* at 116.

On May 9, 1996, an edited version of the videotape of the President's testimony was shown to the jury in open court. The tape had been edited by agreement of the Office of the Independent Counsel and counsel for the criminal trial defendants "to delete certain portions that generally contained objections and argument of counsel." Pet. App. 27a & n.5. A written transcript of the deposition reflecting those deletions was made part of the record. *Ibid.*

The President's testimony was observed by members of the public and the press attending the trial, and has since been widely reported in the news media. A stenographic transcript of the President's testi-

mony was made publicly available by the district court immediately after the tape was shown in court, and was reprinted by a number of newspapers. See Pet. App. 29a. (The transcript is reproduced in the appendix filed by Reporters Committee in the court of appeals. See C.A. App. 173-301.)

Petitioner Citizens United subsequently filed an application in the district court requesting release of edited and unedited copies of the videotape upon completion of the trial. See Pet. App. 45a-48a. The Department of Justice, on behalf of the President in his official capacity, filed a motion for a protective order in the district court to prevent release of the videotape. See *id.* at 49a-51a.[2] The defendants also opposed release of the tape. See *id.* at 30a, 33a n.10. The Independent Counsel deferred to the Department of Justice on that issue. See Response of the Office of Independent Counsel to Appellants' Petition for Expedited Review and Appellants' Brief on the Merits at 1, filed in *United States* v. *McDougal*, No. 96-2236 (8th Cir.) (filed May 13, 1996).

2. On June 11, 1996, the district court granted the motion for a protective order. The court explained that "[t]he videotape was played in open court, to a courtroom full to capacity," and that "written copies of the deposition testimony [were made] available to the public immediately after the videotape was played and a number of newspapers printed the deposition in its entirety." Pet. App. 28a-29a. In light of that access, the court concluded, the First Amendment did not confer on the press a right to copy the videotape.

---

[2] Dow Jones & Company subsequently filed an application for release of the unedited videotape and unedited transcript of the entire deposition. See Pet. App. 28a.

Id. at 29a-30a (citing *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 609 (1978); *United States* v. *Webbe*, 791 F.2d 103, 105 (8th Cir. 1986)).

After "balancing all the relevant factors," the district court also held that Reporters Committee and Dow Jones had no common law right of access to the videotape.[3] The court recognized "the strong interest of the public and the press in access to judicial proceedings and in obtaining important information," Pet. App. 31a, but concluded that several factors weighed against disclosure of the videotape. First, the court noted that "the press * * * attended the trial, reported the events of the trial to the public, and had a transcript of the videotaped deposition available to it." *Ibid.* Second, the court was "not persuaded that access to the videotaped testimony of the President should be treated differently from that of any other witness." *Ibid.* The court explained that if the President had testified in person at trial, Federal Rule of Criminal Procedure 53 and Rule F-5 of the Rules of the United States District Courts for the Eastern and Western Districts of Arkansas "would have prohibited photographing or broadcasting any of the testimony." *Id.* at 32a.[4] The court concluded that "[t]o single the

---

[3] The court assumed, without deciding, that the common law right of access to judicial records encompasses videotaped testimony. Pet. App. 31a.

[4] Rule 53 provides that "[t]he taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court." Rule F-5 provides that authorized members of the news media may make "audio tapes during trials and hearings in open court solely for the purpose of assuring the accuracy of reports," but further provides that

[President's] deposition testimony out for special treatment would contravene the Court's concern with accommodating the interests of the Presidency and might impede any future attempts to tailor an arrangement for obtaining a President's testimony while minimizing the intrusion on his duties." *Ibid.*

Third, the court observed that prior courts had declined to order that videotaped depositions given by Presidents Ford and Carter be released to the public. Pet. App. 32a. Finally, the court determined that "the potential for misuse of the tape" was an additional factor weighing against disclosure, noting the absence of "any safeguard, other than the taste of the marketing medium, against distortion through cutting, erasing, and splicing of [the] tape[]." *Id.* at 33a (quoting *Warner Communications*, 435 U.S. at 601).[5] Although the court declined to permit the videotape to be copied, it ordered (with the consent of the President and the parties) that the unedited portions of the deposition transcript should be released to the public, "in keeping with [the court's] policy of providing the press with full access to the proceedings." *Ibid.*[6]

"[a]udio tape recordings made pursuant to this exception may not be broadcast or rebroadcast to the public, transferred or sold, or used as such for commercial purposes."

[5] The court also noted that one of the defendants, Jim Guy Tucker, was the subject of another indictment that had not yet proceeded to trial. Pet. App. 33a n.10. The court concluded, however, "that the release of the videotape would have little impact on Tucker's second trial and that this factor does not weigh heavily in favor of not releasing the videotape." *Ibid.*

[6] The district court denied petitioner's application for release of the videotape on independent grounds, holding that the organization lacked standing because it is "not a party to

3. The court of appeals affirmed. Pet. App. 1a-19a.

a. The court first concluded that the videotape of President Clinton's deposition testimony is not a judicial record to which the common law right of access applies. Pet. App. 12a-14a. The court distinguished the videotape at issue in this case from "recordings of the primary conduct of witnesses or parties." *Id.* at 13a. Because "Rule 53 of the Federal Rules of Criminal Procedure prohibits photography or other electronic recording of live witness testimony in the courtroom," the court explained, the effect of its holding was to "mandate[] that Rule 15 deponents are treated equally to witnesses who testify in court, in person." *Ibid.*

b. In the alternative, the court of appeals held that the district court's denial of access to the videotape would not constitute an abuse of discretion even if the videotape were assumed to be a judicial record. Pet. App. 14a-17a. The court of appeals based its conclusion in part on the "sound reasons stated by the district court." *Id.* at 16a. The court observed as well that "courts should avoid becoming the instrumentalities of commercial or other private pursuits"; that "granting access to the videotape of President Clinton's testimony could harm the strong public interest in preserving the availability of material testimony in criminal trials"; and that the district court's decision was consistent with "a strong judicial tradition of proscribing public access to recordings of testimony given by a sitting president."

---

this action and is not a news media organization." Pet. App. 26a n.2. We have not contested petitioner's standing to apply for release of the videotape. See *id.* at 59a n.8. The court of appeals did not address that issue. See *id.* at 19a.

Id. at 17a. The court explained that "there has never been compelled in-court live testimony of a former or sitting president, nor has there ever been compelled dissemination of copies of a videotape recording of a sitting president's testimony." *Ibid.*

c. Finally, the court of appeals agreed with the district court that the First Amendment right of access to judicial proceedings does not extend to copying the videotape of the President's testimony. Pet. App. 18a-19a. Because the trial itself was open to the press and public, the court explained, petitioner and Reporters Committee "received all the information to which they were entitled under the First Amendment." *Id.* at 18a.

ARGUMENT

1. Petitioner contends (Pet. 12-13) that review is warranted to address the question whether the First Amendment gives the public the right to obtain a copy of the President's videotaped testimony in a criminal case. He asserts (Pet. 13) that *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589 (1978), left that question open. That claim is incorrect. In *Warner Communications*, this Court rejected the contention that the public and press enjoy a First Amendment right to copy tape recordings that are played in open court in criminal trials. The Court explained that

> the press—including reporters of the electronic media—was permitted to listen to the tapes and report on what was heard. Reporters also were furnished transcripts of the tapes, which they were free to comment upon and publish. The contents of the tapes were given wide publicity by all elements of the media. There is no question of a truncated flow of information to the public.

Id. at 609. Relying on this Court's analysis in *Warner Communications* (see Pet. App. 18a), the court of appeals in this case correctly concluded that the press and public "received all the information to which they were entitled under the First Amendment." *Ibid.*; see also *id.* at 30a (district court holds that "[t]he First Amendment right of the press is fully satisfied in this instance by allowing the press to attend the videotaped deposition to the jury and in providing full access to the written transcript").

Petitioner errs in suggesting (Pet. 12-13) that *Warner Communications* left the First Amendment question "unanswered" in light of the existence of a comprehensive administrative scheme governing the release of President Nixon's recordings. Although *Warner Communications* relied on the existence of that administrative mechanism in rejecting respondents' claim of a common law right of access to the presidential recordings at issue, see 435 U.S. at 602-608, the Court did not suggest that the existence of that scheme was relevant to the disposition of respondents' *constitutional* claim, see *id.* at 608-610.

Petitioner also contends (Pet. 13) that the district court's refusal to release the videotape violated the First Amendment because it was based on a concern that petitioner "would use the videotape to undermine President Clinton's popularity during the 1996 Presidential campaign." Contrary to petitioner's assertion, neither the court of appeals nor the district court suggested that access was being denied in order to shield the President from political comment or criticism, either from petitioner or from anyone else. Rather, those courts based their holdings in part on the quite different concern that private parties might misuse the tape by selectively editing it to distort the

President's testimony. See Pet. App. 32a ("once released and rebroadcast, the press cannot maintain control over individuals who might copy the broadcast and edit it to suit their purposes"); *id.* at 16a (referring with approval to the district court's conclusion that "there exists a potential for misuse of the tape"). That concern was based directly on this Court's decision in *Warner Communications*, 435 U.S. at 603, which recognized that the courts should avoid "becom[ing] a partner in the use of" tapes in judicial custody " 'to gratify private spite or promote public scandal,' * * * with no corresponding assurance of public benefit."

2. Petitioner also contends (Pet. 14-18) that it is entitled to obtain a copy of the videotape of the President's testimony under the common law right of access to judicial records. The court of appeals correctly concluded that the videotape is not a "judicial record" (Pet. App. 12a-14a) and that, even if it were, the district court did not abuse its discretion in refusing to allow the videotape to be copied. *Id.* at 14a-17a. The court of appeals' rejection of petitioner's common law claim does not warrant this Court's review.

a. Petitioner takes issue (Pet. 14-16) with the court of appeals' threshold determination that the videotape is not a judicial record for purposes of the common law right of access. As the court of appeals explained, however, the videotape at issue in this case is not a recording of a witness's or party's "primary conduct"; instead, it is simply an electronic recording of witness testimony. *Id.* at 13a. Because Rule 53 of the Federal Rules of Criminal Procedure prohibits the recording of witness testimony in the courtroom, the public's access to such testimony is typically

limited to the opportunity to observe the testimony at trial and to obtain a written transcript. The court of appeals' holding therefore places Rule 15 deponents "on [an] equal footing" with witnesses who testify in open court. Pet. App. 14a. That result appropriately preserves the traditional scope of public access to witness testimony.

Unlike the court of appeals in this case, the Second Circuit has held that a videotaped deposition is subject to release under the common law right of access to judicial records. See *In re Application of CBS, Inc.*, 828 F.2d 958, 959-960 (2d Cir. 1987).[7] This case, however, does not provide a suitable vehicle for resolution of that conflict. Both courts below concluded (see Pet. App. 14a, 31a) that petitioner would not be entitled to access to the videotape even if it were determined to be a judicial record. Because that alternative holding provides an independent ground for the decision below, the question whether a videotaped deposition constitutes a judicial record does not warrant further review in this case.[8]

---

[7] The Second Circuit recognized that a videotaped deposition conducted pursuant to Rule 15 might be edited to delete extraneous material before being shown to the jury. See 828 F.2d at 960. The court's analysis makes clear, moreover, that the videotape actually played at trial—*i.e.*, the edited videotape —would constitute the "judicial record" to which a common law right of access would attach. See *id.* at 959 ("the common law right to inspect and copy judicial records applies to any item entered into evidence at a public session of a trial") (italics and internal quotation marks omitted). To the extent that petitioner seeks access to the *unedited* videotape (see Pet. App. 47a), the Second Circuit's decision provides no support for its claim.

[8] Petitioner also suggests (Pet. 15-16) that the court of appeals' holding conflicts with decisions of the District of

b. Although the common law affords members of the public a right of access to judicial records, this Court has emphasized that "the right to inspect and copy judicial records is not absolute." *Warner Communications*, 435 U.S. at 598. Requests for access are "left to the sound discretion of the trial court * * * in light of the relevant facts and circumstances of the particular case." *Id.* at 599. The courts below correctly concluded that release of the videotape would be inappropriate even if the videotape were determined to be a judicial record.

The district court identified four factors that weighed against allowing the videotape to be copied and broadcast. First, the court noted that the public and the press had already been given "substantial access" to the President's testimony. The trial at which the videotape was played was open to the press and public, and a verbatim transcript of the deposition was subsequently made available. Pet. App. 31a. Second, the court concluded that release of the videotape would cause the President's testimony to "be treated differently from that of any other witnesses," and would "contravene the * * * concern with accommodating the interests of the Presidency" that underlay the court's original deposition order. *Id.* at 31a, 32a. Third, the district court observed that

---

Columbia, Third, and Seventh Circuits. Of the four cases cited by petitioner, however, three—*United States* v. *Guzzino*, 766 F.2d 302, 303 (7th Cir. 1985); *United States* v. *Martin*, 746 F.2d 964, 966 (3d Cir. 1984); *In re National Broadcasting Co.*, 653 F.2d 609, 611 (D.C. Cir. 1981)—involved tapes of primary conduct by parties, a situation that the court of appeals (Pet. App. 13a) expressly distinguished. The other case—*Smith* v. *United States District Court*, 956 F.2d 647, 648 (7th Cir. 1992)—did not involve a tape recording at all.

videotaped testimony given in previous cases by other sitting Presidents had never been ordered to be made available for public copying. *Id.* at 32a. Finally, the court recognized that copies of the tape would be subject to potential "misuse" by persons who could "edit it to suit their purposes," leading to possible "distortion through cutting, erasing, and splicing." *Id.* at 32a-33a (quoting *Warner Communications*, 435 U.S. at 601). The court of appeals found those considerations to be "sound reasons" for declining to permit the videotape to be copied. *Id.* at 16a.

Of those four factors, the only one that petitioner seriously disputes is the final one, the potential for misuse of the videotape. See Pet. 20. As explained above, however, this Court's decision in *Warner Communications* makes clear that the potential for misuse is an appropriate consideration. In discussing the qualified nature of the common law right of access, the Court explained that "access has been denied where court files might have become a vehicle for improper purposes," as where records might be "used to gratify private spite or promote public scandal." 435 U.S. at 598. The Court specifically noted the risk that tape recordings could be distorted through "cutting, erasing, and splicing." *Id.* at 601. It was thus appropriate for the district court and the court of appeals to consider the risk of misuse as one of several factors bearing on the requests to copy the videotape.[9]

---

[9] Petitioner contends (Pet. 18) that consideration of potential misuse could preclude the copying of judicial records in all cases, since every judicial record could be used for commercial purposes. But the court of appeals did not hold that a trial court must disallow copying whenever a risk of private exploitation is present; it simply held that the potential for such

Finally, as the court of appeals recognized (Pet. App. 17a), no sitting President has ever been compelled to give live, in-court testimony, and no court has ever directed that a recording of a President's deposition testimony be made available for public copying. That historical record demonstrates "a strong judicial tradition of proscribing public access to recordings of testimony given by a sitting president." *Ibid.* Petitioner makes no attempt to refute the court of appeals' assessment of judicial tradition in this area. Instead, petitioner (Pet. 16-17) invokes decisions of other courts of appeals that have recognized a "strong presumption" in favor of access to judicial records. Petitioner contends (Pet. 17) that those cases demonstrate that "the presumption favoring access is particularly strong when the materials sought relate to the activities of public officials." Those decisions, however, involve video or audio recordings of illicit actions of public officials. See *United States* v. *Martin*, 746 F.2d 964, 966 (3d Cir. 1984); *In re Application of National Broadcasting Co., Inc.*, 653 F.2d 609, 611 (D.C. Cir. 1981); *United States* v. *Criden*, 648 F.2d 814, 815 (3d Cir. 1981); *In re Application of National Broadcasting Co.*, 635 F.2d 945, 947 (2d Cir. 1980). The videotape in this case, by contrast, records deposition testimony given by a sitting President as a witness in a criminal case; the

---

exploitation is a legitimate consideration to be weighed in the balance. Petitioner also cites *United States* v. *Guzzino*, 766 F.2d 302 (7th Cir. 1985), for the proposition that concern about commercial misuse is illegitimate. See Pet. 21. In *Guzzino*, however, the tape recordings in question were withheld by the district court not because of concerns about commercial misuse, but rather because of shortcomings in the technical quality of the recordings. See 766 F.2d at 303-304.

tape does not record primary conduct that is at issue in the underlying criminal proceeding.[10]

3. Petitioner also contends (Pet. 23) that the public had a First Amendment right to attend the President's deposition itself, and that the videotape must be made available for copying in order to "vindicate" that right. The decisions on which petitioner relies (see Pet. 22), however, do not support its constitutional claim. Those cases involved courtroom proceedings that have traditionally been open to the public. The Court's First Amendment analysis in that setting emphasized the common law tradition of public attendance at particular stages of a criminal proceeding. See *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 505-508 (1984) (jury selection in criminal case); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 603-606 (1982) (criminal trial); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 564-580 (1980) (Opinion of Burger, C.J.) (criminal trial). There is, however, no common law tradition of public attendance at pretrial depositions. Cf. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 33 (1984) ("pretrial depositions and interrogatories are not public components of a civil trial").[11]

---

[10] The judicial tradition of restricting access to recordings of presidential testimony furthers important interests. As the district court recognized (Pet. App. 32a), releasing the videotape at issue here "might impede any future attempts to tailor an arrangement for obtaining a President's testimony while minimizing the intrusion on his duties." *Ibid.*

[11] Petitioner's reliance (see Pet. 23) on *United States* v. *Poindexter*, 732 F. Supp. 165 (D.D.C. 1990), is misplaced. The court in that case *denied* a request by the press to attend a deposition of former President Reagan. Although the court relied in part on the fact that the deposition could involve

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
MICHAEL S. RAAB
Attorneys

JULY 1997

---

discussion of "sensitive security information" that would be "impractical to screen out in advance" of the deposition, the court also emphasized the qualified nature of the right of access to pretrial proceedings. *Id.* at 167. The court noted that "[i]t could hardly be argued that there is a tradition of public access to the type of pretrial proceeding involved here," and that "there has never been an instance of public testimony by a former President in a pretrial hearing." *Ibid.*